DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-212048 **DATE:** March 27, 1984

MATTER OF: Edison Chemical Systems, Inc.

DIGEST:

1. Manufacturer which is a potential supplier of waterproofing sealer to contractors bidding under a solicitation for a contract funded by a federal agency grant is an interested party to file complaint allegedly restrictive specifications regarding contractor use of manufacturer's product where the complaint is filed prior to the bid opening date.

2. An agency procedure which precludes the listing of a complainant's product as an acceptable brand name and requires adherence to a prequalification procedure for certification of the acceptability of this brand for listing by any contractor prior to including it in its bid promotes favoritism and is grounds for sustaining complaint where the complainant's product was determined to be acceptable by the cognizant drafter of the specifications well before bid opening.

Edison Chemical Systems, Inc. (Edison), complains of the use of a brand name or equal specification for masonry sealer in a solicitation issued by the Housing Authority for the City of Pittsburgh (Housing Authority), for the pointing and waterproofing of brickwork at a housing project, using federal funds provided by the Department of Housing and Urban Development (HUD). Edison complains that the solicitation required Eco-seal waterproofing sealer or its equal, without listing Edison's similar product, System-90, as an approved equal. Edison points out that the architectural firm in charge of the project found Edison's product to be an approved equal and amended the solicitation to list it, but that the Housing Authority subsequently amended the specifications to delete the listing of System-90, because of the failure to utilize the necessary agency procedures for obtaining certification as an equal product.

We sustain the complaint.

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As a preliminary matter, HUD asserts that our Office should not consider the complaint because the complainant is not a prospective contractor and, therefore, is not an interested party. As HUD points out, in the Public Notice entitled "Review of Complaints Concerning Contracts Under Federal Grant," 40 Fed. Reg. 42406, September 12, 1975, our Office issued the standards and procedures under which we will consider such complaints. The notice states:

> ". . . we will undertake reviews concerning the propriety of contract awards made by grantees in furtherance of grant purposes upon request of prospective contractors."

By that language, we intended to limit the parties that can initiate our review to those with direct and recognizable interests. Generally, this consists of bidders under the grantee's solicitation. Association of Citizens from Alpine, Texas, B-211704, May 26, 1983, 83-1 CPD 569. Thus, in this regard, we have held that potential suppliers did not necessarily have a sufficient interest to have their complaints considered by our Office. Hydro-Clear Corporation, B-189486, February 7, 1978, 78-1 CPD 103.

However, a protester may be viewed as possessing a sufficient interest in the award selection even though the protester may not bid on the procurement, as, for example, protests considered by this Office which were filed by a labor union, a contractor's association, and a Chamber of Commerce. Generally, in determining whether a protester satisfies the interested party requirement, consideration is given to the nature of the issues raised and the direct or indirect benefit or relief sought by the protester. This serves to insure the protester's diligent participation in the protest process so as to sharpen the issues and provide a complete record on which the propriety of the procurement will be judged. Northwest Independent Forest Manufacturers, B-207711; B-207975, July 1, 1982, 82-2 CPD 8.

In this instance, Edison is a manufacturer which supplies a waterproofing sealer which competes with the Eco-seal product which was listed in the solicitation. During the conduct of the procurement, Edison engaged in correspondence with the architectural firm in charge of the project regarding the acceptability of Edison's product. The architectural firm determined that Edison's product was

an acceptable equal and, at this point, Edison's product was listed as another acceptable brand name in the solicitation. While we have explicitly held that we do not usually review subcontractor protests, our Office does consider potential subcontractors to be interested parties for the purpose of protesting the inclusion of allegedly restrictive subcontractor specifications in the prime contracts where the protest is filed prior to the bid opening date for the prime contract solicitation. Ingersoll-Rand Company; Sullair Corporation, B-207246.2; B-211811, September 28, 1983, 83-2 CPD 385. In our view, similarly,Edison, the manufacturer and supplier of a sealer which competes with the brand name product listed for use by the prime contractor under this solicitation, having filed its complaint before bid opening, possesses the requisite interest to protest the allegedly restrictive product specification. See also Mosler Systems Division, American Standard Company, B-204316, March 23, 1982, 82-1 CPD 273.

Edison's complaint essentially is that its product is equal to the listed product, and that it was found to be so by the architectural firm in charge of the project, but that it was not listed by name in the solicitation. Alternately, it argues that the solicitation should not have used a brand name or equal product specification.

HUD contends that the use of brand name or equal specifications was consistent with the applicable standard under section 10(b), attachment "O," OMB Circular A-102, which permits such specifications where it is impractical or uneconomical to make a clear and accurate description of the technical requirements. In this respect, HUD argues that it is unnecessary to list all qualifying brand names, because the solicitation specifically permits contractors to bid on the basis of equal products, requiring that the contractor submit the name of such products and supporting material to the Housing Authority for written approval 10 days prior to the bid opening date. Here, the solicitation provision at issue required use of waterproofing sealer consisting of a one-component blend of polymers with a high solids content and oliphatic solvent as offered by Eco-seal, or an approved equal.

HUD does not contend that Edison's product is not equal to the listed Eco-seal product. Rather, HUD argues that the Housing Authority need not and does not list all equal products under a brand name or equal specification; rather, it delegates the choice of the product to be listed to the discretion of the project architect who drafts the

specifications. The solicitation provides the above-cited procedures for qualifying other products. Edison's product was not approved by the Housing Authority and was deleted from the solicitation, because the specified procedures for obtaining approval were not followed; however, the cognizant architect had explicitly found that Edison's product is functionally acceptable as an equal product and warranted listing as such in the solicitation.

Our Office reviews the propriety of contract awards made by grantees to insure that federal government agencies are requiring their grantees, in awarding contracts, to comply with any applicable federal requirements, including the terms of the grant agreement. Wismer & Becker Contracting Engineers, B-202075, June 7, 1982, 82-1 CPD 538. In this instance, the grantee is subject to state and local legal requirements and to the requirements of attachment "O" to OMB Circular A-102, which requires a grantee to conduct all procurements in a manner that provides maximum open and free competition. Since there apparently are no applicable state or local statutory requirements concerning the qualification of equal products, our review is based on whether the procurement was conducted in a manner consistent with the fundamental principles or norms of federal procurement inherent in the concept of competition. Wismer, supra.

In our view, the listing in the solicitation of only one acceptable product, when there is another known acceptable product, gives the appearance of favoritism on the part of the procuring activity and provides a competitive advantage for the manufacturer of the listed product. An unlisted producer could not qualify its own product, but would have to find and interest one or more general contractors that would be willing to take steps to have the product qualified for bidding. Here, the project architect, which HUD explicitly states was given discretion to determine the brand to be listed on the solicitation, approved the Edison product as an equal, and neither HUD nor the Housing Authority disputes the fact that Edison's product is, in fact, equal for the purposes contemplated under the solicitation.

Edison's product had already been listed as an equal on the previous solicitation which had been canceled 2 months prior to the bid opening date of the subject

solicitation. However, notwithstanding the admitted equality of the product, Edison's product was eliminated from the solicitation simply because the precise prequalification procedure outlined had not been followed. Thus, this is not a situation where there is an attempt to qualify a product found acceptable after the issuance of the solicitation.

We also note that under Federal Procurement Regulations § 1-1.307-4 (1964 ed. amend. 139) all known acceptable brand name products are required to be listed in a solicitation which utilizes a brand name or equal specification. While we recognize that this regulation is not directly applicable, we believe that the requirement is indicative of the proper method of assuring that maximum competition will be obtained where brand name or equal specifications are used.

Furthermore, attachment "O" specifically indicates that procurement procedures shall not restrict or eliminate competition by placing unreasonable requirements on firms in order for them to qualify to do business. We find that the practical effect is to place an unreasonable restriction on the unlisted product here in view of the factual circumstances.

We note that the contract has been substantially performed. However, we recommend that, in the future, when grantees are using brand name or equal specifications, the solicitations include all brand names which are known to qualify as equal, without the imposition of further prequalification requirements.

Milton J. Socolar

for Comptroller General
of the United States